United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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P/S

75-1109

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- ADOLPHO RIVERA, JR., Appellant.	Docket No. 75-1109

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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I

The Government agrees with appellant that United States v. Rivera, Doc. No. 74-2115, slip op. 2263 (2d Cir., March 13, 1975, as modified April 1, 1975), and United States v. Reid, Doc. No. 74-2598-2599, slip op. 3073 (2d Cir., April 24, 1975), require vacature of the judgments of conviction on Counts Two and Three for violation of 18 U.S.C. §2114 (Government Brief at 7).

However, the Government argues that there was sufficient evidence to establish the crime of robbery and that therefore, under the amended opinion in United States v. Rivera, supra,* the conviction on Counts Two and Three can be sustained as a violation of 18 U.S.C. §2112 (Government Brief at 14).

The amended opinion in Rivera, supra, slip op. at 2287, holds that a conviction invalid under §2114 can be sustained under §2112 only if the jury received instructions on and the proof shows a completed robbery. The Government's arguments that the robbery here was proved and that it was irrelevant that the judge failed to instruct the jury on the elements of a completed robbery are both legally and factually erroneous. Not only did the Government fail to prove that appellant aided and abetted an attempted robbery (Appellant's Brief at 12-14), but it also failed to show that a completed robbery occurred.

It is axiomatic that:

> To constitute robbery, there "must be both a taking and a carrying away of the property." Clark & Marshall, LAW OF CRIMES, §12.09 at 882 (7th ed. 1967).
>
> United States v. Reid, supra, slip op. at 3095. Emphasis in the original.

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*Until the filing of the Government's brief, appellate counsel was unaware of the modification of the opinion in United States v. Rivera, supra. Since the order amending the original opinion and the amended opinion were not distributed even to the Second Circuit library, as are other opinions of this Court, it was not known except apparently to the parties in that case.

An example of this rule is this:

> Thus, if a would-be robber, by his violence, causes the other's money to fall to the ground, but fails to get possession of it, he is not guilty of robbery.
>
> Perkins, ON CRIMINAL LAW, §2 at 279-280 (2d ed. 1969).

See also Clark & Marshall, LAW OF CRIMES, supra, §12.12 at 886.

Authorities cited by the Government teach the same:

> The robbery is complete when the goods [in this case, government money] are taken [*] from the person of another and held by the robber for a perceptible interval of time.
>
> Duffy v. Hudspeth, 112 F.2d 559 (10th Cir. 1940).

> Since robbery includes larceny, it also includes asportation, which is an element of larceny. The degree of the taking is immaterial, the least removing of the thing from the place it was before with intent to steal it being sufficient.
>
> Rutkowski v. United States, 149 F.2d 481, 483 (6th Cir. 1945).

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*By this use of the word "take," the Duffy court necessarily included the element of asportation. See Perkins, ON CRIMINAL LAW, supra, at 280. If this were not the case, the decision in Duffy would conflict with this Court's decision in Reid, supra, and generally accepted principles of criminal law. See Perkins, ON CRIMINAL LAW, supra, at 280, and Clark & Marshall, LAW OF CRIMES, supra, at 886.

> Just as larceny requires that the thief both "take" (secure dominion over) and "carry away" (move slightly) the property in question, so too robbery requires both a taking and an asportation (in the sense of a slight movement) of the property.
>
> LaFave and Scott, CRIMINAL LAW, §94 at 693 (1972).

The proof in this case shows that appellant appeared for the first time, accompanying Fontanez back to Castillo's parked car, that Fontanez pointed a gun at Castillo and took the keys to Castillo's car, and that appellant held Castillo's wrists. Here the only conceivable basis for a conviction under §2112 is a robbery of the $14,000 in the trunk of Castillo's car, since appellant was charged with "assault ... with intent to rob ... such money and property of the United States," referring "to wit, [to] fourteen thousand dollars ($14,000) of official Advance Funds" (Count Two), and the Judge's charge was similarly limited (Tr. 191, 192). Since there was neither a taking nor a carrying away of the money, a completed robbery was not effectuated. United States v. Reid, supra, slip op. at 3095.

Nor did Fontanez and appellant possess -- actually or constructively -- the money involved.

> "Constructive possession" is that which exists without personal occupation of land or without actual personal present dominion over a chattel, but with intent and capability to maintain control and dominion.
>
> United States v. Pardo-Bolland, 348 F.2d 316, 324 (2d Cir. 1965).

Here, the continuous presence of the surveillance team and the quick capture of appellant still inside the car by that group of agents who had surrounded the car with guns drawn negates the assertion that either Fontanez or appellant ever had dominion and control over the advance money. Cf. United States v. Wolfenbarger, 426 F.2d 992, 994-995 (6th Cir. 1970); United States v. Pardo-Bolland, supra, 348 F.2d at 324.

Moreover, mere constructive possession does not establish that element of robbery which requires a carrying away. United States v. Reid, supra, slip op. at 3095; Clark & Marshall, LAW OF CRIMES, supra, §12.12 at 886. Furthermore, Fontanez and appellant were not even charged with a completed robbery. Rather, Count Two charged that they "did assault Jerry Castillo ... with intent to rob ...," while Count Three charged the use of a dangerous weapon in the course of the acts charged in Count Two (see Indictment, "B" to appellant's separate appendix). Thus, appellant was not fairly apprised of the charge of completed robbery, and a conviction based on this charge is fatally defective. Stirone v. United States, 361 U.S. 212, 217-218 (1969); United States v. Denmon, 483 F.2d 1093, 1095 (8th Cir. 1973).

Nor did the District Court instruct the jurors on the element of the crime of robbery or that a finding of completed robbery was necessary for a finding of guilt on Counts Two and Three.* Since the jurors did not make any fact findings on

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*The Government concedes this at 14 of its brief.

this issue, Rivera itself requires a reversal for a new trial if the case is to be premised on a §2112 violation.

As was stated in United States v. Howard, 506 F.2d 1131, 1134 (2d Cir. 1974):

> When Howard exercised his right to a jury, he put the Government to the burden of proving the elements of the crimes charged to a jury's satisfaction, not to ours or to the district judge's.

Here, the error goes directly to appellant's right to have the jury instructed as to the crimes being charged and the essential elements of those crimes so that the jury may make a finding on those facts. Screws v. United States, 325 U.S. 91, 107 (1945); United States v. Fields, 466 F.2d 119, 121 (2d Cir. 1972); United States v. Clark, 475 F.2d 240, 250 (2d Cir. 1973); cf. United States v. Kaplan, 510 F.2d 606, 612 (2d Cir. 1974).

Unlike the situation in United States v. Reid, supra, slip op. at 3096, the jury here could not have found all the facts required for a completed robbery.

II

Appellant argues that since the Judge's charge improperly permitted a conviction based on the alternative theories of aiding and abetting an assault or homicide, the charge permitted a conviction without a finding of all the elements of the crime. In response, the Government argues that the Judge's instructions, placed in context, indicate that the jury was

told at the time the instructions on the substantive crime were given that the Judge would later define aiding and abetting. The Government then argues that the jury thus related the necessary intent back to the specific count of the indictment.

The District Court's charge itself clearly refutes this analysis since the Judge stated that, in making the required finding of a criminal venture "in all four counts," the jury may consider whether appellant joined a criminal venture to rob or to kill or to assault (Tr. 200-201, 216).

CONCLUSION

For the foregoing reasons and the reasons set forth in the main brief for appellant, this case must be reversed and remanded to the District Court for re-trial with instructions to dismiss Counts Two and Three and to vacate the sentence heretofore imposed on those counts.

Respectfully submitted,

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